

EXHIBIT 63

Transcript of Rany L. Simms
Conducted on January 23, 2019

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1 A About two hours or so, including lunch.

2 Q Was there anyone else present besides
3 yourself and Plaintiff's counsel when you were
4 preparing for this deposition?

5 A No.

6 Q Besides what you've already told me, did you
7 review any other documents during your preparation for
8 this deposition to refresh your recollection?

9 A Nothing other than what was listed in my --
10 the exhibits to my report.

11 Q Nothing else?

12 A No.

13 Q Did you speak with anyone else other than
14 Plaintiff's counsel to refresh your recollection for
15 this deposition?

16 A No.

17 Q Now, you understand that you have been
18 designated to testify as an expert witness on behalf
19 of Rubik's Brand Limited in this case, right?

20 A Yes.

21 Q And you are testifying as Rubik's Brand
22 Limited's expert witness today, correct?

23 A Yes.

24 (Exhibit 158 was marked for identification
25 and is attached to the transcript.)

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1 A I don't know anything about their
2 relationship.

3 Q Do you understand that the Defendant in this
4 case is Flambeau, Inc.?

5 A Yes.

6 Q And do you understand that if I refer to the
7 Defendant as "Flambeau," that refers to Flambeau,
8 Inc.?

9 A Yes.

10 Q Do you understand that Flambeau operates a
11 division called Duncan Toy Company?

12 A I do now.

13 Q When did you first learn that?

14 A I believe -- actually, I believe that's in
15 the pleadings. I think they were listed as one of the
16 Defendants, and I believe there was -- correct me if
17 I'm wrong, I believe that they were stricken because
18 it was pointed out that they were a division and not a
19 separate legal entity.

20 Q That is correct. Thank you, sir.

21 Do you understand that if I refer to this
22 division as "Duncan," that that is the Duncan Toy
23 Company division of Flambeau?

24 A Okay.

25 Q Besides reading the pleadings in this case,

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1 how are you familiar, if at all, with Duncan?

2 A Well, I heave heard of Duncan Toys, and I'm
3 not sure of all of the products that they produced,
4 but ...

5 Q Do you know any of the products Duncan has
6 produced?

7 A I'm not sure. Was the yo-yo one of their
8 products?

9 Q Yes.

10 A Beyond that, I -- my memory fails me.

11 Q For how long, as best as you can recollect,
12 have you associated Duncan with yo-yos?

13 A Probably when I was a kid, I assume, that I
14 knew that Duncan was a manufacturer of yo-yo, I
15 believe. Sometime. Maybe not then, but subsequently.

16 Q Do you associate Duncan with any other
17 products?

18 A Not offhand.

19 Q Do you have any opinion, positive or
20 negative, of Duncan?

21 A No.

22 Q Do you have any opinion, positive or
23 negative, of Flambeau?

24 A No.

25 Q Do you know whether Duncan is a well-known

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1 brand in the toy industry?

2 A Not of personal experience, but I assume
3 that they're one of the leaders in the toy industry.

4 Q Do you know whether Duncan has a positive
5 reputation in the toy industry?

6 A I have no way of knowing.

7 MR. HUDIS: Off the record.

8 (A discussion was held off the record.)

9 BY MR. HUDIS:

10 Q Mr. Simms, off the record I showed counsel
11 what is in my hand, which we agree is a genuine
12 Rubik's Cube, and it's got the Rubik's house mark and
13 rubiks.com domain name on it.

14 Do you see that? (Showing the witness.)

15 A Yes.

16 Q All right. And until the actual marked
17 deposition exhibit arrives, we're going to use this
18 Rubik's Cube in my hand, and counsel and I have
19 stipulated that's a genuine Rubik's Cube.

20 Do you understand that?

21 A Yes.

22 Q Before today, what knowledge did you have of
23 the Rubik's Cube as shown in my hand?

24 A By "knowledge," what do you mean? I am
25 familiar with it.

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1 Q I'm sure.

2 How long have you been familiar with the
3 Rubik's Cube?

4 A I do not know. I'm sure I had one in my
5 possession when I was growing up at some point in
6 time. I guess -- actually, it must have been after I
7 was growing up, because it came out in the '80s, I
8 believe. So I am familiar with the product.

9 Q Did you ever buy a Rubik's Cube for
10 yourself?

11 A I have no recollection of that.

12 Q Did you ever buy a Rubik's Cube as a gift
13 for someone else?

14 A I have no recollection of that.

15 Q Have you ever played with a Rubik's Cube?

16 A Yes.

17 Q When was the last time you played with a
18 Rubik's Cube?

19 A Many years ago.

20 Q Have you ever observed someone else playing
21 with a Rubik's Cube?

22 A Probably on television or something like
23 that.

24 Q To the best of your knowledge, Mr. Simms,
25 when playing with a Rubik's Cube, what is the object

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1 of playing with it?

2 A As far as I know, it is to return the cube
3 to the original position where you have colors on each
4 side of that particular device.

5 Q Okay. So I have the Rubik's Cube in my
6 hand --

7 A Yes.

8 Q -- and it has unified colors of the
9 following: White, yellow, orange, red, green, and
10 blue. Do you see that?

11 A Yes.

12 Q And there is no mixing of the colors in any
13 way. Do you see that?

14 A Yes.

15 Q Is this what you meant by its original
16 state?

17 A Yes.

18 Q What does it mean to scramble a Rubik's
19 Cube?

20 A I would assume it means to mix up that
21 particular device and -- so it no longer has uniform
22 colors on one side.

23 Q By turning it?

24 A Yes.

25 Q By its smaller cubes which we call cubies?

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1 Q Would you agree, yes or no, that a spatial
2 logic toy has a purpose to come to a certain desired
3 result by moving the toy in some fashion?

4 A I'll accept that.

5 MR. HUDIS: Off the record.

6 (A discussion was held off the record.)

7 (Exhibit 159 was marked for identification
8 and is attached to the transcript.)

9 BY MR. HUDIS:

10 Q Mr. Simms, I show you what's been marked as
11 Exhibit 159. Do you recognize the document?

12 A (Reviewing.)

13 Yes.

14 Q Do you recognize this document as
15 Jessie Roberts' expert report submitted in this
16 action?

17 A Yes.

18 Q And you reviewed Miss Roberts' report --
19 this is M-S -- and you said you reviewed Ms. Roberts'
20 report in connection with your preparation for this
21 deposition?

22 A Yes.

23 Q And you reviewed Ms. Roberts' report so that
24 you could prepare your own report of Exhibit 158,
25 correct?

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1 know what the -- actually what the industry considers
2 a fidget toy and what they don't consider a fidget
3 toy.

4 Q So would you have any reason to disagree
5 with Ms. Roberts' characterization of a fidget toy and
6 a spatial logic toy in paragraph 43 of Exhibit 159?

7 A I repeat me answer, I don't know what a
8 fidget toy really is defined as and whether this
9 qualifies as a fidget toy or not.

10 (Exhibit 47 was previously marked for
11 identification and is attached to the transcript.)

12 Q Mr. Simms, I show you what's been previously
13 marked as Deposition Exhibit 47.

14 Do you recognize the document?

15 A Yes. I have seen it.

16 Q What is it?

17 A It is the trademark registration of the
18 trade dress of the Rubik's Cube.

19 Q Mr. Simms, if you could turn to paragraph 15
20 of your report, Exhibit 158.

21 Paragraph 15 of Exhibit 158, is that your
22 description of what is provided on the Registration
23 Certificate of Exhibit 47?

24 A Yes. I hope I copied it correctly.

25 Q Now, I'm going to be asking you some

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1 Q So you knew him as an examining attorney at
2 the USPTO, correct?

3 A Yes.

4 Q Could you please describe the mark shown in
5 the Registration Certificate of Exhibit 47.

6 A It's the trade dress of the Rubik's Cube.

7 Q Do you understand that if I refer to this
8 design as the "Rubik's Cube design," that I am
9 referring to the design shown in the drawing of
10 Exhibit 47?

11 A Would you repeat that question again.

12 Q Do you understand that if I refer to this
13 design as the "Rubik's Cube design," that I am
14 referring to the design shown in the drawing of
15 Exhibit 47?

16 A Yes.

17 Q Do you understand that this is the design --
18 the Rubik's Cube design in which RBL is claiming
19 trademark rights in this case?

20 A Yes.

21 Q Is there a statement describing the mark in
22 this Registration Certificate of Exhibit 47?

23 A Yes.

24 Q All right. What does it say?

25 A It says, "The mark consists of a black cube,

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1 having nine color patches on each of its six faces,
2 with the color patches on each face being the same and
3 consisting of the colors red, white, blue, green,
4 yellow, and orange."

5 Q Does this description of the mark in Exhibit
6 47 convey to the public what the owner's mark is?

7 A It does to me. I don't know whether it
8 conveys it to the public.

9 Q Does the description of the mark in the
10 registration certificate function as a notice to
11 competitors regarding the parameters of the owner's
12 mark?

13 A Yes.

14 Q We previously defined trade dress -- what
15 trade dress is and the types of trade dress.

16 Do you remember that discussion we had?

17 A Yes. I probably didn't define it as well as
18 I could have, but yes.

19 Q Would the mark shown in the registration of
20 Exhibit 47 be considered trade dress?

21 A Yes.

22 Q Would the marks shown in the '094
23 registration -- you understand if I refer to the
24 registration of Exhibit 47 as the '094 registration,
25 they're one in the same?

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1 A Yes.

2 Q And that refers to Registration No.

3 1,265,094?

4 A Yes.

5 Q Would the mark shown in the '094
6 registration be considered a configuration mark or
7 packaging?

8 A It would be -- if you were going to
9 categorize it as either one, I suppose it would be a
10 configuration mark.

11 Q Let's go back to your expert's report. I'd
12 like you to turn to, in Deposition Exhibit 58 [sic],
13 Exhibits 2 and 3 to your report.

14 A (Complying.)

15 Q Mr. Simms, does this report of Exhibit 158
16 constitute the entirety of the opinions you intend to
17 provide in this case?

18 A So far as -- as revealed now, yes.

19 Q So Exhibit 2 to your report, is this the
20 entirety of what you reviewed to prepare your report?

21 A As far as the documents reviewed, yes.
22 Those list the documents I reviewed.

23 Q Let's turn to Exhibit 159, Ms. Roberts'
24 report, and I'd like to turn to Exhibit C, please.

25 A (Complying.)

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1 Q Ms. Roberts -- to prepare your report, did
2 you review any of the patents listed in Ms. Roberts'
3 report at Exhibit C?

4 A The only patent I reviewed is listed in the
5 documents reviewed in my report.

6 Q So the only document that is listed in your
7 report is U.S. Patent No. 4,378,116; is that right?

8 A Yes.

9 Q And that is the only patent you reviewed to
10 prepare your report; is that correct?

11 A Yes.

12 Q Let's turn to Exhibit D of Ms. Roberts'
13 report, Exhibit 159. Did you review any of the case
14 decisions in Ms. Roberts' report of Exhibit D?

15 A I reviewed some of them.

16 Q Could you tell us which ones?

17 A Morton-Norwich, Bose. I'm a little bit
18 familiar with Babies Beat. At least I've reviewed
19 what she said about that case. Inwood Laboratories.

20 Q That's the functionality case we talked
21 about before?

22 A Yes, which I referred to as Ives.

23 Q Uh-huh.

24 A Nothing else in connection with preparation
25 of my report.

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1 Q To prepare your report did you review any of
2 the Specialized Seating cases?

3 A No.

4 Q To prepare your report did you review any of
5 the Moleculon case?

6 A No.

7 Q Mr. Simms, could you turn to Exhibit E in
8 Ms. Roberts' report, Exhibit 159.

9 A (Complying.)

10 Q Did you review the articles cited in
11 Ms. Roberts' report of Exhibit E to prepare your
12 report?

13 A No.

14 Q We discussed previously what you know about
15 the relationships between Ernő Rubik's and RBL. I'd
16 like to ask you a couple of other questions.

17 Do you know about any relationship between
18 Ernő Rubik and Ideal?

19 A No.

20 Q Do you know about any relationship between
21 Ideal and CBS?

22 A No, other than I think they were in the
23 chain of title of the registration, I believe.

24 Q That's Exhibit 47?

25 A Yes.

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1 BY MR. HUDIS:

2 Q Mr. Simms, while we were on the break, I
3 marked a series of documents which were all patents.
4 They're deposition exhibits now, 1 [sic] through 166.

5 I'm going to read some portions of them into
6 the record and then ask you a question about each of
7 the patents. Do you understand?

8 A Okay.

9 Q Exhibit 160. The inventor is Larry Nichols.
10 The owner is Moleculon Research Corporation. The
11 filing date of the underlying Application is March 4,
12 1970. It issued on April 11, 1972. The title of the
13 patent is "Pattern Forming Puzzle and Method with
14 Pieces Rotatable in Groups."

15 Mr. Simms, Exhibit 160, did you consider
16 this patent in forming your opinion as to whether the
17 '094 trademark registration was obtained by fraud?

18 A No.

19 Q Exhibit 161. It's an English translation of
20 a Hungarian patent. The Applicant is Ernő Rubik. The
21 inventor is Ernő Rubik. The filing date of the
22 Application is January 30, 1975. The published -- it
23 published on October 28, 1976, and issued on
24 December 31, 1977. The title of the patent is
25 "Spatial Logic Toy."

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1 Mr. Simms, did you consider this patent of
2 Exhibit 161 in forming your opinion whether the '094
3 trademark registration was obtained by fraud?

4 A No.

5 Q I'd like to go back to an exhibit I just
6 discussed with you, which is Exhibit 160, which is the
7 Nichols patent.

8 Did you consider the Nichols patent in
9 forming your opinion as to whether the Rubik's Cube
10 design shown in the '094 trademark registration is
11 functional?

12 A No.

13 Q And Exhibit 161, which we just went over,
14 did you consider this patent, the Hungarian patent, to
15 formulate your opinion as to whether the Rubik's Cube
16 design shown in the '094 trademark registration was
17 functional?

18 A No.

19 Q I'd like you to now turn, Mr. Simms, to
20 Belgium Patent 887.875, marked as Exhibit 162. The
21 Applicant is Ernő Rubik. The owner is Politechnika
22 Ipari Szovetkezet. The filing date is March 10, 1981,
23 made available to the public July 1, 1981. The title
24 of the patent is "Spatial Logic Toy."

25 Mr. Simms, did you consider the patent of

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1 Exhibit 162 in forming your opinion as to whether the
2 '094 trademark registration was obtained by fraud?

3 A No.

4 Q Did you consider the Belgium patent of
5 Exhibit 162 in forming your opinion as to whether the
6 Rubik's Cube design shown in the '094 trademark
7 registration was functional?

8 A No.

9 Q Mr. Simms, I'd now like you to take a look
10 at what's now been marked 163, it's a Hungarian
11 patent, 180.387. The underlying Application was filed
12 on October 28, 1980, it was published on June 28,
13 1982, and issued on October 30, 1986. The inventor is
14 Ernő Rubik. The title of the patent is "Spatial Logic
15 Toy."

16 Mr. Simms, did you consider the Hungarian
17 patent of Exhibit 163 in forming your opinion as to
18 whether the '094 trademark registration was obtained
19 by fraud?

20 A No.

21 Q Did you consider the patent of Exhibit 163
22 in forming your opinion as to whether the Rubik's Cube
23 design shown in the '094 trademark registration is
24 functional?

25 A No.

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1 Q Mr. Simms, I now would like to show you
2 what's been marked as Deposition Exhibit 164. It is a
3 patent, U.S. Patent 4,378,116. The inventor is
4 Ernő Rubik. The assignee is Politoys Ipari
5 Szovetkezet. The filing date of the underlying
6 Application is August 3, 1981. The issue date of the
7 patent is March 29, 1983.

8 And I ask, Mr. Simms, did you consider this
9 patent of Exhibit 164 in forming your opinion as to
10 whether the '094 trademark registration was obtained
11 by fraud?

12 A Well, it is one of the documents that I
13 had -- I reviewed. I went to the Office website and
14 printed out that patent.

15 Q Did you have anyone else interpret the
16 patent of Exhibit 164 for you?

17 A No.

18 Q Mr. Simms, I now show you what's been marked
19 as Deposition Exhibit 165. It is U.S. Patent No.
20 4,378,117. The inventor is Ernő Rubik. The assignee
21 is Politoys Ipari Szovetkezet. If I didn't say this
22 before, the inventor is listed as Ernő Rubik. The
23 filing date of the underlying Application is August 3,
24 1981. The issue date is March 29, 1983.

25 And I'd like you to take note that one of

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1 the references cited is the Hungarian patent that we
2 looked at already, of Exhibit 161. The title of the
3 patent is "Spatial Logic Toy."

4 And I'd like to know, Mr. Simms, if you
5 considered this patent of Exhibit 165 in forming your
6 opinion as to whether the '094 trademark registration
7 was obtained by fraud?

8 A No.

9 Q Did you consider the patent of Exhibit 165
10 in forming your opinion as to whether the Rubik's Cube
11 design shown in the '094 trademark registration is
12 functional?

13 A No.

14 Q Mr. Simms, I show you what's been previously
15 marked as Deposition Exhibit 166. It's an English
16 translation of a Japanese patent. The number is
17 S53-120946. It has a publication date of October 21,
18 1978, an Application date of March 29, 1977. The
19 title of the invention is "Rotation Type Stereoscopic
20 Combination Toy."

21 Mr. Simms, did you consider this patent of
22 Exhibit 166 in forming your opinion as to whether this
23 '094 trademark registration was obtained by fraud?

24 A No.

25 Q Did you consider the Japanese patent of

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1 Exhibit 166 in forming your opinion as to whether the
2 Rubik's Cube design shown in the '094 trademark
3 registration is functional?

4 A No.

5 MR. HUDIS: Off the record.

6 (A discussion was held off the record.)

7 (Exhibit 167 and Exhibit 168 were marked for
8 identification and are attached to the transcript.)

9 BY MR. HUDIS:

10 Q Mr. Simms, I now show you two exhibits that
11 I just marked as deposition exhibits.

12 Exhibit 167 is the Application File History
13 underlying the U.S. trademark registration 1,265,094
14 which we previously marked as Exhibit 47.

15 Do you understand that?

16 A Yes.

17 Q And I also marked as Exhibit 168 a printout
18 from the Trademark Status and Document Retrieval
19 system of the U.S. Patent and Trademark Office,
20 otherwise known as TSDR -- you're familiar with that?

21 A Yes.

22 Q -- for Registration No. 1,265,094.

23 Do you see that?

24 A Yes.

25 Q Mr. Simms, we're going to be spending a bit

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1 Q And you see there's a lining statement there
2 at the bottom of page 39?

3 A Yes.

4 Q And is it the same lining statement that
5 shows up in the trademark registration of Exhibit 47?

6 A It appears to be, yes.

7 Q And if you turn to page -- production page
8 42 of the exhibit, you'll see that it was attested to
9 by Samuel L. Cohen, Senior Vice President?

10 A Yes.

11 Q And the Application has with it a drawing
12 that's on page 249. Do you see that?

13 A Yes.

14 Q And then we have samples of the goods
15 showing the mark, one of which is on page --
16 production page 253.

17 Do you see that?

18 A Yes.

19 Q And you also see that on production page
20 255? Do you see that?

21 A Yes.

22 Q And again, the Application shows on pages --
23 production pages 41 and 42 that the Application was
24 submitted by Richard Rabkin, patent counsel.

25 Do you see that?

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1 A Yes.

2 Q You would agree it is reasonable to assume
3 that patent counsel is aware of patents related to the
4 goods of his client; is that right?

5 MR. SAUNDERS: Objection.

6 A Would you repeat the question?

7 Q Yes. You would agree it is reasonable to
8 assume that patent counsel is aware of the patents
9 related to the goods of his client?

10 A I would assume so.

11 Q In this case you would agree it is
12 reasonable to assume that after the -- patent counsel
13 is aware of patents related to 3D puzzles?

14 A I have no way of knowing of what he's aware
15 of, I'm sorry.

16 Q Did you consider for your report any
17 inferences which could be made from the Application
18 file history that the Applicant was aware of patents
19 related to the 3D puzzles?

20 A Could you repeat the question again?

21 Q Yes. Did you consider for your report any
22 inferences which could be made from the Application
23 file history -- that's Exhibit 167 -- that the
24 Applicant was aware of patents related to 3D puzzles?

25 A I assume he was related -- I assume he knew

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1 knew her as an examining trademark attorney at the
2 U.S. Patent and Trademark Office?

3 A Yes.

4 Q That's Kathleen Gallagher?

5 A Yes.

6 Q I'd like you to turn to production page 43.

7 MR. HUDIS: Off the record.

8 (A discussion was held off the record.)

9 BY MR. HUDIS:

10 Q So in Exhibit 167 we're now at production
11 page 43. Do you see that?

12 A Yes.

13 Q And do you recognize this page as the first
14 Office Action issued in connection with this
15 Application?

16 A Yes.

17 Q And the date of the Office Action is
18 July 27, 1982?

19 A Yes.

20 Q And this Office Action, you see that it was
21 signed by Ms. Gallagher?

22 A Yes.

23 Q And she's the assigned examining attorney,
24 correct?

25 A Yes.

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1 Q And you see that she issued at least an
2 initial refusal of the Application, correct?

3 A Yes.

4 Q All right. And the original refusal was on
5 the basis that it's a configuration of goods that is
6 functional. Do you see that?

7 A Yes.

8 Q She invites the Applicant to respond. Do
9 you see that?

10 A Yes.

11 Q And she says -- Ms. Gallagher says that the
12 goods are indefinite. Do you see that?

13 A Yes.

14 Q And she suggests a rewording of the goods to
15 "three-dimensional puzzles." Do you see that?

16 A Yes.

17 Q And you see that she did not, after
18 reviewing Office Records, issue a likelihood of
19 confusion refusal? Do you see that?

20 A Yes.

21 Q Let's turn now to production page 44 of
22 Exhibit 167. And do you recognize production pages 44
23 through 96 as the response to the Office Action we
24 just discussed?

25 A (Reviewing.)

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1 Yes.

2 Q Do you see that the Office Action response
3 was signed on September 3, 1982? That's on production
4 page 44.

5 A Yes.

6 Q And according to the stamp, it was received
7 in the Office on September 7, 1982?

8 A Yes.

9 Q And you see as an amendment to the
10 Application the Applicant revises its identification
11 of goods to "three-dimensional puzzles"? Do you see
12 that?

13 A Yes.

14 Q And that's the same description of the goods
15 that shows up in the Registration Certificate of
16 Exhibit 47?

17 A Yes.

18 Q Now, you see on production page 45 of
19 Exhibit 167 that in the third full paragraph the
20 Applicant concedes that the mark sought for
21 registration is a configuration of the goods?

22 A Yes.

23 Q And you see there is a quote from
24 Inwood Labs that is on page production page 46. Do
25 you see that?

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1 in Ideal vs. Chinese Arts of any patents or patent
2 Application kickbacks. Do you see that? Are you
3 aware of that?

4 A I have not read this since I did my report,
5 but I assume that's correct.

6 Q And on production page 59 there is a
7 statement here about the relationship between Rubik
8 and Ideal; do you see that? And I'll read it to you.
9 Bottom of page -- production page 59:

10 "The cube which Ideal sells was invented by
11 a teacher in Hungary, Ernő Rubik, in about 1975.
12 Ideal now has, by agreement, an exclusive arrangement
13 with the inventor to sell the puzzle in the
14 United States."

15 Do you see that?

16 A Yes.

17 Q Did you consider this relationship between
18 Ernő Rubik and Ideal in connection with forming the
19 opinions as expressed in your report?

20 A I was aware of that relationship because it
21 was mentioned in this opinion, yes.

22 Q Let's go to production page 60. Do you see
23 here in the third full paragraph it says, "The game is
24 to manipulate each level of the cube so as to mix up
25 the colors and then try to reassemble the cube into

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1 the original one-color per side position."

2 Do you see that?

3 A Yes.

4 Q Did you consider this in connection with
5 your opinions expressed in your report?

6 A I reviewed everything in the file, including
7 this opinion, yes.

8 Q Now, the Applicant on production pages 62
9 through 63, you see where that paragraph spanning the
10 two pages, it says, "A wide variety of possible
11 patterns on each side other than solid colors as well
12 as a wide variety of color shapes and sizes could have
13 been used by Defendants in their products."

14 Do you see that?

15 A Yes.

16 Q Now, the consideration of alternative
17 designs, is that the law today in determining
18 functionality?

19 A Yes. It is one of the Morton-Norwich
20 factors that continues today, yes.

21 Q Is that expressed in the TrafFix vs. MDI
22 case?

23 A I am not sure, but it is clear from the
24 Federal Circuit opinion, the value case, that
25 Morton-Norwich survives TrafFix Devices.

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1 one is issued by the Third Circuit, and it is on
2 pages -- production pages 83 through 96.

3 Do you see that?

4 A Yes.

5 Q And the Third Circuit affirms the issuance
6 of a preliminary injunction; do you see that?

7 A Yes.

8 Q And on page 84 the Third Circuit discusses
9 the relationship between Mr. Rubik and Ideal; do you
10 see that?

11 A Yes.

12 Q And did you consider this relationship as
13 part of your opinions expressed in your report?

14 A Again, I read the whole file, and I
15 considered everything in the file in connection with
16 my report.

17 Q So on page 85, production page 85, at the
18 top, it says, "Ideal holds no patent rights in the
19 Rubik's Cube."

20 Do you see that?

21 A Yes.

22 Q All right. Now, we've gone through a couple
23 of patents. Did Mr. Rubik at this point in time,
24 1982, hold any patents for configurations of the
25 Rubik's Cube?

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1 A According to the exhibits, I believe he did.

2 Q Now, on page -- production page 86 of the
3 file history, Exhibit 167, there's a description of
4 the mark in footnote 3.

5 Do you see that?

6 A Yes.

7 Q Do you consider that description by the
8 Third Circuit to be an accurate description of the
9 Rubik's Cube?

10 A And where does this description come from
11 again?

12 Q Right here on the page.

13 A I see it, but what is the Court referring
14 to, oral argument?

15 Q Yes.

16 A Description by counsel for the Appellee.

17 (Reviewing.)

18 Yes, I see it.

19 Q Do you think it's an accurate description of
20 the Rubik's Cube which I'm holding up in front of you
21 (indicating)?

22 A It appears to be.

23 Q In that same footnote it says right below
24 the description, "The District Court obviously acted
25 under severe time constraints of a preliminary

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1 Q Yes. And the quote I'm looking for is at
2 the bottom of page 90, where you are.

3 A Uh-huh.

4 (Reviewing.)

5 Yes.

6 Q And do you believe that's still the law
7 today?

8 A Yes.

9 Q And if we could go now to production page
10 232.

11 A (Complying.)

12 Q It is after the Third -- the end of the
13 Third Circuit's opinion.

14 A 232?

15 MR. HUDIS: If we can go off the record.

16 (A discussion was held off the record.)

17 BY MR. HUDIS:

18 Q So you see on production page 232 there is
19 an assignment of the mark and Application from
20 Ideal Toy to CBS, Inc.; do you see that?

21 A Yes.

22 Q And was recorded with the USPTO on
23 September 20, 1982?

24 A Yes.

25 Q And the assignment occurred on April 5,

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1 1982; do you see that?

2 A Yes.

3 Q And you considered this assignment as part
4 of your review of the file history?

5 A I saw the assignment, yes, when I reviewed
6 the Application file.

7 Q If we could now turn to production page 97.

8 A (Complying.)

9 MR. HUDIS: Off the record.

10 (A discussion was held off the record.)

11 BY MR. HUDIS:

12 Q And you see here there is a second Office
13 Action?

14 A Yes.

15 Q And the mailing date is January 17, 1983?

16 A Yes.

17 Q And on the bottom of production page 97 the
18 examining attorney who signed this Office Action is
19 Kathleen Gallagher?

20 A Yes.

21 Q So we have a common understanding, what is
22 an Office Action?

23 A An Office Action is a letter written by the
24 Office either after the Application is filed or in
25 response to an Applicant's communication.

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1 Q So we have a common understanding of terms,
2 Mr. Simms, if I use the terms either "Office" or the
3 acronym "USPTO," you and I understand that means the
4 U.S. Patent and Trademark Office?

5 A Yes.

6 Q And Ms. Gallagher in this second Office
7 Action on production page 97 says that the mark
8 applied for is a configuration of the goods, and it's
9 functional, and she appears to dismiss the
10 significance of the Chinese Arts and Plawner decisions
11 as preliminary injunction decisions decided on the
12 basis of secondary mean.

13 Do you see that?

14 A I see the paragraphs you have referenced to.

15 Q Uh-huh.

16 A She, in her second full paragraph, is merely
17 summarizing what happened before, that she has refused
18 on the grounds of primary functionality, and in the
19 third full paragraph she indicates that those
20 decisions involve preliminary injunctions, and then
21 she says that in each decision the Court based the
22 decision to enjoin the Defendant's activities on
23 findings of secondary meaning.

24 Q All right. And in this Office Action --

25 A Yes.

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1 Q -- of page 97, Exhibit 167, at the bottom,
2 Ms. Gallagher says, "Applicant must set forth the
3 registration numbers of any patents which cover the
4 goods in the Application."

5 Do you see that?

6 A Yes.

7 Q Now, this examining attorney, Ms. Gallagher,
8 asks for patents which covered the goods in the
9 Application, right?

10 A Yes.

11 Q And the goods in the Application at this
12 point are three-dimensional puzzles, right?

13 A Yes.

14 Q So the Examiner asked for patents related to
15 three-dimensional puzzles, right?

16 A She asked for registration numbers for those
17 patents.

18 Q Not just patents for puzzles having certain
19 colors, right?

20 A She asked for patents which cover the goods.

21 Q And a reasonable person would read this
22 request to mean that the Applicant should turn over or
23 identify by number all patents related to the
24 three-dimensional puzzles, right?

25 MR. SAUNDERS: Objection. Calls for

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1 speculation, argumentative.

2 Q You may answer.

3 A The examining attorney asked for patent
4 numbers of patents which cover the goods.

5 Q Would that request from the Examiner include
6 foreign patents?

7 A It asks for patent numbers, so it could.

8 Q Could it include -- could the request from
9 the Examiner include patent Applications?

10 A It could include numbers of patent
11 Applications, yes.

12 Q Now, we established that in your work
13 history you used to be an examining attorney, right?

14 A Yes.

15 Q As an examining attorney, wouldn't you want
16 your Applicants to err on the side of inclusiveness
17 when asking for information or materials?

18 A Could you repeat the question?

19 Q Yes. As a trademark examining attorney,
20 wouldn't you want your Applicants to err on the side
21 of inclusiveness when asking for information or
22 materials?

23 A Let me put it this way, if you put a request
24 in your Application, you would like the Applicant to
25 respond to it. And if they didn't, you would want to

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1 repeat that requirement.

2 Q Now, regarding the question of
3 registrability of a mark, as an examining attorney,
4 more information in front of you would be better than
5 less, correct?

6 MR. SAUNDERS: Hold on. I didn't hear the
7 last part.

8 MR. HUDIS: More information would be better
9 than less.

10 A If you're an examining attorney, you want to
11 have all of the information in front of you or
12 available to you in order to make a decision on the
13 issue you have, yes.

14 Q So as an examining attorney, you wouldn't
15 want your Applicant selectively choosing which patents
16 to give you in response to your request, you would
17 want copies or numbers of all the patents that related
18 to the goods in question if you asked, correct?

19 MR. SAUNDERS: Objection.

20 A If you asked for patent numbers, I assume --
21 I would think the examining attorney would want the
22 Applicant to respond to that request by listing patent
23 numbers, that's correct.

24 Q All of them?

25 A Yes.

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1 Q If we could go now to production page 98 of
2 Exhibit 167.

3 A (Complying.)

4 Q This is now the Applicant's second response
5 to the second Office Action we just discussed; is that
6 correct?

7 A Yes.

8 Q And this response was signed by
9 Richard Rabkin on May 25, 1983, and received in the
10 Office on May 31, 1983; is that correct?

11 A Yes.

12 Q And on pages 98 and 99 Mr. Rabkin, for the
13 Applicant, is arguing that the Rubik's Cube is
14 nonfunctional and has attained secondary meaning.

15 Do you see that?

16 A Yes.

17 Q And he cites to two new opinions, In Re:
18 Certain Puzzle -- excuse me, In Re: Certain Cube
19 Puzzles and CBS vs. Logical Games; do you see that?

20 A Yes.

21 Q And Mr. Rabkin refers to and submits the
22 preliminary injunction declarations of himself and
23 Morton Schneider from a case titled Ideal vs. Dajere,
24 D-A-J-E-R-A [sic], without the attached exhibits.

25 Do you see that?

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1 and I want to know, as far as you can tell, is the ITC
2 description of the mark accurate. Including the
3 definition of the mark and the object of the game.

4 A (Reviewing.)

5 MR. SAUNDERS: You're asking him about
6 pages -- what page?

7 MR. HUDIS: 112 through 114.

8 MR. SAUNDERS: That means he's asking
9 whether every statement on those pages is accurate.

10 MR. HUDIS: On the mark and description of
11 the game. So not every single statement.

12 MR. SAUNDERS: I would suggest that you
13 point him to a specific statement that you're asking
14 him is accurate or not.

15 MR. HUDIS: Sure, I can do that.

16 Q So starting on page 112, "Ideal claims a
17 common law trademark in the appearance of its cube" --
18 "Ideal's cube puzzle called the Rubik's Cube, a
19 six-sided cube made of black plastic. Each side there
20 are nine smaller cubes called cubies. In the regular
21 or less expensive version of the cube, the outer face
22 of the cube are covered with adhesive squares of the
23 same color when the puzzle is in the starting
24 position. The colors are used" -- "used are red,
25 blue, yellow, green, orange, and white. These colors

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1 appear against a black grid pattern formed by the
2 black plastic background."

3 Is that an accurate description of the
4 Rubik's Cube.

5 A I would say yes.

6 Q "In the deluxe model the same general colors
7 are used but the hues are different from those in the
8 regular model. The colored squares in the deluxe cube
9 are made of plastic and are inserted and glued into
10 the black cubes. In addition, the black background
11 grid is thicker than on the regular cube. The colored
12 sides are slightly raised, and the cube is slightly
13 larger than the regular cube."

14 Do you see that?

15 A Yes.

16 Q And that is an accurate description of the
17 Rubik's Cube?

18 MR. SAUNDERS: Objection. It refers to a
19 cube that is not defined, not before us, and we have
20 no idea what "deluxe model" is.

21 MR. HUDIS: I will ask it in a different
22 way.

23 Q Is that description I just read to you from
24 the ITC decision an accurate description of the
25 Rubik's Cube I hold in front of you (indicating)?

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1 A It appears to be, yes.

2 Q Then it says on page 114:

3 "According to Ideal, this creates a
4 distinctive grid background. This is the very way the
5 puzzle looks in the starting position and the way the
6 cube looks when the puzzle is solved. The player
7 rotates sections of the puzzle and scrambles the
8 colors. The colors must be unscrambled to solve the
9 cube" -- "to solve the puzzle. It is sold in the
10 starting position so the purchaser will know that the
11 puzzle can be solved."

12 Is that an accurate description of how to
13 use the Rubik's Cube?

14 MR. SAUNDERS: Objection.

15 A Yes. It appears to be the way that the
16 puzzle is solved -- the Rubik's Cube puzzle is solved.

17 Q Mr. Simms, on production page 115 there is a
18 discussion of the relationship between Rubik and
19 Ideal, and it says, "A U.S. firm, Logic Games, is the
20 first company to sell cube puzzles in the
21 United States having the appearance of the Rubik's
22 Cube puzzle."

23 Do you see that?

24 A Yes.

25 Q All right. "Logical Games obtained 3,000

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1 that?

2 A Yes.

3 Q Which was submitted to the USPTO, correct?

4 A Yes.

5 Q And he identifies himself in paragraph 1 as
6 in-house patent counsel for Ideal; do you see that?

7 A Yes.

8 Q And there is no mention in Mr. Rabkin's
9 declaration in its entirety of patents, is there?

10 A That, I do not recall. If you say so,
11 it's --

12 Q In paragraph --

13 A I did read the declaration in its entirety
14 before my report, but not since then.

15 Q And do you see in paragraph 7, on production
16 page 164, Mr. Rabkin says, "As patent counsel for
17 Ideal, I am responsible for licensing of trademarks,
18 patents and copyrights owned by Ideal Corporation."

19 Do you see that?

20 A Yes.

21 Q Now, that statement by Mr. Rabkin, would you
22 agree that this supports an inference that the
23 Applicant was aware of patents relating to
24 three-dimensional puzzles?

25 MR. SAUNDERS: Objection.

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1 A I would assume that since he's responsible
2 for licensing of trademarks, patents, and copyrights
3 that he would know of all of the intellectual property
4 involved.

5 Q Did you consider that fact in connection
6 with issuing the opinions in your report?

7 A Again, the issue, for example, of fraud was
8 based upon Ms. Roberts' statement that there was fraud
9 committed by the Applicant because there was an
10 omission of the -- by -- on the part of the Applicant
11 of listing particular patent numbers and that
12 constituted fraud, but that is not the law. So --

13 Q In your view --

14 MR. SAUNDERS: Let him finish, please.

15 A Yes, under the Bose case, it must be a
16 knowingly false statement with intent to deceive. And
17 none of this demonstrates that the Applicant made a
18 knowingly false statement with intent to deceive.

19 Q Mr. Simms, would you agree that case law on
20 the subject of fraud before the PTO says that the
21 knowledge of the actor can be inferred by the
22 circumstances?

23 A There may be decisions that say that, yes,
24 but Bose also says that fraud -- the Court held that
25 fraud must be a knowingly false statement with intent

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1 Q And in fact, Ms. Gallagher was not the
2 examining attorney who approved the Application for
3 publication; is that correct?

4 A W.A. Conn is listed as the examining
5 attorney on the registration.

6 Q And from that you are making the inference
7 that he was the examining attorney who approved the
8 Application for publication?

9 A Yes.

10 MR. HUDIS: Off the record.

11 (A discussion was held off the record.)

12 BY MR. HUDIS:

13 Q Mr. Simms, I'm now going to go a little more
14 in-depth in the patents that we marked and looked at
15 earlier.

16 I'd like you to look at Exhibit 160, which
17 is the Nichols patent.

18 A (Complying.)

19 Q And if you could turn to production page
20 1072.

21 A (Complying.)

22 Q And it says in the Abstract, the last
23 sentence, "If the assembly is initially arranged
24 properly and then disarranged by a random sequence of
25 rotations, it then serves as a device whose object is

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1 the restoration of the original arrangement."

2 Do you see that?

3 A Yes.

4 Q So do you see that as a toy that can be
5 assembled and disassembled?

6 A It appears to be, yes.

7 Q If we could go to production page 1074 of
8 Exhibit 160.

9 A I'm sorry, which?

10 Q 1074.

11 A Yes.

12 Q Okay. And you understand that the patent is
13 broken into columns, right?

14 A Yes.

15 Q All right. And each column, each line, has
16 more or less a number assigned to it?

17 A Yes.

18 Q All right. So if we look at the passage in
19 column 1 between lines 30 and 37, I'd like to read
20 that to you:

21 "In particular, the invention includes such
22 devices wherein the engagement is provided by
23 mechanical or magnetic means, providing structural
24 integrity without restriction of rotational freedom
25 and wherein each piece is colored or patterned on its

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1 exposed surfaces in a way which allows its arrangement
2 with the other pieces into recognizable predetermined
3 pattern whose establishment is the object of
4 manipulation."

5 Do you see that?

6 A Yes.

7 Q So basically what this is saying -- if you
8 agree, tell me -- that the pieces of the Nichols cube
9 can be turned?

10 MR. SAUNDERS: Object as beyond the scope of
11 the witness's expert report.

12 A It says what it says. It appears, as we
13 discussed a minute or two ago, that the assembly can
14 be rotated and disarranged, if that's in response to
15 your question.

16 Q It is.

17 And that in this passage I just read to you
18 on page 1074, that "The turning of the pieces serves
19 to match the external indicia which, in this case, can
20 be either colors or patterns."

21 Do you see that?

22 A Yes.

23 Q And it says that?

24 A It says, "Each piece is colored or
25 patterned." Correct.

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1 Q Let's turn to Exhibit 161, which is the
2 Rubik Hungarian patent, 170.062. On the top of page
3 640 it says, "The object of the invention relates to a
4 spatial toy" -- "spatial logic toy which may be
5 assembled from 27 solid pieces into, with respect to
6 its external shape, a closed cube."

7 And then it goes on to state different types
8 of embodiments. Do you see that?

9 A Yes.

10 Q And those embodiments you can see on page
11 645 of the patent and on 647 of the patent. Do you
12 see that?

13 MR. SAUNDERS: Object as beyond the scope of
14 the expert report.

15 A Yes, I see them.

16 Q And on production page 645 of the patent of
17 Exhibit 161, this is a 3x3x3 cube; do you see that?

18 MR. SAUNDERS: Objection to the form of the
19 question.

20 A A 3x3x --

21 Q 3.

22 A Yes.

23 Q And on page 647 you see it's a 2x2 cube or
24 2x2x2?

25 A Yes.

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1 Q Now, if you go to page 640 of Exhibit 161,
2 the third full paragraph, which starts with "In
3 accordance."

4 Do you see that?

5 A On 640?

6 Q Yes.

7 A The third full paragraph begins, "The most
8 well-known."

9 Q This paragraph (indicating).

10 A Oh, okay.

11 Q Now, at the end of that paragraph it says,
12 "The surfaces of the cubes are supplied with
13 predetermined planar figures or three-dimensional
14 shapes or numbers coded with which they may be
15 differentiated from each other and matched with each
16 other, which as a result of a rotation around the
17 spatial axes, according to the very different
18 variations or combinations appear as further specific
19 legible figures, number, or other symbol combinations
20 on the given face of the cube."

21 Do you see that?

22 A Yes.

23 Q And then the next sentence, "The most
24 well-known toy can be built into a large cube from
25 small cubes is the toy in which a figure fragment is

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1 drawn on each of the faces of the small cubes forming
2 the large cube, which fragments, after the large cube
3 has been assembled in the correct order, form six
4 different complete pictures with all of the six
5 delimiting faces the large cube. Therefore, a total
6 of six pictures or figures may be established through
7 the correct single assembly of the small cubes. As
8 the small cubes have six faces, other variations are
9 also possible. In other words, a total of 36 pictures
10 may be assembled."

11 Do you see that?

12 A Yes.

13 Q So the passages that I just read to you, the
14 invention of the Hungarian patent of Exhibit 161
15 contemplates the turning of smaller cubies, correct?

16 MR. SAUNDERS: Objection. Continuing
17 objection as beyond the scope of the expert report and
18 the witness's opinions and also object to the form of
19 the question.

20 Q You may answer.

21 A The description here contemplates the
22 turning or disassembling of an object which has images
23 on the little cubies, yes.

24 Q And the images can be figures, numbers or
25 other symbols or pictures?

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1 A Whatever it says there, yes.

2 Q Mr. Simms, let's look at the Belgium patent,
3 887.875 of Exhibit 162. And if you could turn to
4 production page 621.

5 A (Complying.)

6 Q And I'm reading at the bottom of the page,
7 so you follow with me.

8 "The surfaces of the cubes are supplied and
9 coated with predetermined flat illustrations or
10 plastic shapes or numeric figures, by which they may
11 be made to be distinct and identifiable from each
12 other by rotating on the spatial axes. They appear to
13 be transformed into other illustrations, numeric
14 figures or combinations of specific symbols in
15 compliance with the most diversified variation or
16 combinations as well as those that are most the
17 legible or visible on a given surface of the cube."

18 Next paragraph:

19 "One of the most familiar of" -- I'll start
20 again.

21 "One of the most familiar of toys
22 constructed from small cubes is a toy in which each
23 side of the small cubes that make up the large cube is
24 supplied with a portion of an illustration, which
25 after the cubes have been correctly adjusted, form six

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1 complete images that are different by themselves on
2 the surface of all sides; i.e., six sides of the large
3 cube. This way, overall, six images or illustrations
4 may be formed by just one correct adjustment of the
5 small cubes."

6 Do you see that?

7 A Yes.

8 Q So this is a description of the invention
9 that you are turning the smaller cubies, correct?

10 A Yes.

11 Q And the object, then, is then to match the
12 external indicia, which in this patent describes
13 illustrations, images, or illustrations.

14 Do you see that?

15 A Yes.

16 Q And if you look at the embodiments in this
17 patent at the back, the drawings, one embodiment is a
18 3x3 by three cube and another embodiment is a 2x2x2
19 cube.

20 Do you see that?

21 A Yes.

22 Q Let's turn to Exhibit 163, Hungarian patent
23 180.387.

24 A (Complying.)

25 Q And on page 659 at the top -- production

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1 page 659 -- it says, "The object of the invention
2 relates to a spatial logic toy which has a given
3 number of toy elements arranged so as to be rotatable
4 around the spatial axes projected from the geometrical
5 center of the logic toy."

6 Do you see that?

7 A Yes.

8 Q And in the next paragraph it refers to
9 Hungarian patent 170.062, and we've already discussed
10 that, correct?

11 A Yes.

12 Q And then if you skip a sentence it says,
13 "Numbers, figures, colors, or other symbols are on the
14 external face surface of the toy elements forming each
15 of the surfaces of the large cube which may be
16 arranged into a predetermined logical order by the
17 simultaneous joint rotation of the nine toy elements
18 forming each face surface of the large cube."

19 Do you see that?

20 A Yes.

21 Q And then it says, "Japanese Patent
22 Specification No. 55-396 discloses a cube-shaped toy
23 composed of rotatable small elements in the case of
24 which nine small cubes, cube faces, located on each of
25 the cube faces of the large cube can be arranged by

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1 rotation so that each large cube face contains the
2 same color of small cube faces."

3 Do you see that?

4 A Yes.

5 Q And then turn the page, please, to page 660,
6 top third of the page:

7 "Due to the colors, figures, numbers or
8 other symbols, such as dominoes, applied to the
9 external faces of the toy elements forming the surface
10 of the spatial logic toy according to the invention.
11 There is an extremely large number of possible
12 solution variations which primarily develops the
13 logical thinking of adolescent children, but there is
14 also the possibility to create rules for various games
15 and then play these games."

16 Do you see that?

17 A Yes.

18 MR. SAUNDERS: To the extent you're
19 continuing to ask him what the patent says and does he
20 see it, we'll stipulate that these patents say what
21 they say.

22 MR. HUDIS: Uh-huh, I understand.

23 Q And on page 665, the paragraph numbered 8 --
24 and I believe these are the -- this is one of the
25 claims -- "Embodiment of the spatial logic toy

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1 according to any claims 1 through 7 characterize that
2 colors or letters and numbers or other symbols are on
3 the external surfaces of the toy elements" -- I don't
4 have to read any numbers -- "with the latter
5 optionally being established in relief."

6 Do you see that?

7 MR. SAUNDERS: Object to the form of the
8 question.

9 A Yes.

10 Q And if you look at the next page, 666, the
11 embodiment is a 2x3x3 cube?

12 A Yes.

13 Q So this patent, again, discusses turning the
14 smaller cubies of the cube, correct?

15 A Yes.

16 Q And the object is to match the external
17 indicia which, in the patent, contemplates numbers,
18 figures, colors, dominoes, or other symbols?

19 A Yes.

20 Q Let's turn now Exhibit 164. This is the
21 Rubik U.S. '116 patent. You have to be verbal.

22 A Oh. Yes.

23 Q All right. And Mr. Simms, you notice that
24 the embodiment on page 667 of Exhibit 164 is the same
25 embodiment that was on page 666 of 163?

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1 A Yes. 3x3x2.

2 Q Now, it says -- in the Abstract it says that
3 this is a spatial logic toy, and at the end of the
4 Abstract it says, "In such a manner the toy elements
5 forming the lateral faces of the spatial logic toy can
6 be rotated along the spatial axes by yielding several
7 variation possibilities. The toy is well suitable for
8 stimulating logical thinking activity."

9 Do you see that?

10 A Yes.

11 Q And there is a description of the object of
12 the invention in the Background on column 1, lines 15
13 through 22, as well as lines 34 through 42, and lines
14 50 through 55.

15 Do you see that?

16 MR. SAUNDERS: Object to the form of the
17 question. Compound.

18 A I see the numbers and I see the paragraphs,
19 yes.

20 Q So without my reading all of this text, this
21 patent -- which you reviewed, correct?

22 A Correct. That's correct.

23 Q Right -- contemplates turning smaller cubies
24 of the larger cube, correct?

25 A Yes.

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1 Q All right. And with the goal of matching
2 certain external indicia which, in this patent,
3 discusses colors, numbers, figures, dominoes, or other
4 symbols, correct?

5 MR. SAUNDERS: Where are you referring to
6 now?

7 MR. HUDIS: The passages on column 1, lines
8 15 through 22, lines 34 through 42, and lines 50
9 through 55.

10 A (Reviewing.)

11 MR. SAUNDERS: I instruct the witness if
12 he's going to answer that compound question, he's
13 going to have to read all of those paragraphs.

14 Q Please do.

15 A Okay. The first one you said is 15 to 22?

16 Q Correct.

17 A (Reviewing.)

18 Yes, 15 to 22 discusses each surface colored
19 or carry numbers, figures, or other symbols which can
20 be assembled.

21 Q And then lines 34 through 42 discusses
22 colors, figures, numbers, or any other symbols, for
23 example, dominoes?

24 A Yes, I see that language.

25 Q Right. And then again in column 1, lines 50

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1 through 55, it says by means of the symbols, numbers,
2 the colors, et cetera?

3 A Yes, I see that.

4 Q So again, would you say that the object of
5 this invention is to turn the cubies of the larger
6 cube to match external indicia such as colors,
7 numbers, figures, other symbols such as dominoes?

8 A That's the object of the invention, yes.

9 Q If we could turn to the Rubik patent,
10 '114 -- 378.117, all right, which is Exhibit 165.

11 Now, Mr. Simms, you did not review this
12 patent in connection with your report, did you?

13 A That's correct.

14 Q Now, it says in the Abstract of the
15 invention of Exhibit 165, on page 1361, it's a spatial
16 logic toy in the form of a regular geometrical solid,
17 the toy elements of which are assembled so that the
18 halves of the logical toy taken along the axis can be
19 rotated in any direction of the spatial axes of the
20 body in relation to the other half.

21 Do you see that?

22 A Yes.

23 Q And the embodiment -- one of the embodiments
24 discussed in the patent on page 1362 is a 2x2x2 cube;
25 is that right?

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1 A Yes.

2 Q And if we turn to the Background of the
3 invention, it says on lines 17 through 21, "The small
4 cubic elements forming the plane surfaces of the large
5 cube are either colored or indicated with numbers,
6 figures, or any other symbols."

7 Do you see that?

8 A Yes.

9 Q And then it says, "Accordingly, by rotating
10 the cubes, several combinations become possible in
11 compliance with the contents yield by the indicia."

12 Do you see that?

13 A Yes.

14 Q So the object of this invention is to turn
15 the smaller cubies, right?

16 A Yes.

17 Q And to match the external indicia which, in
18 this patent, contemplates colored -- colors, numbers,
19 figures, or other symbols, right?

20 A That's the object of the invention, yes.

21 Q If we could turn to the Japanese patent of
22 Exhibit 166. On page 1583 of Exhibit 166, all right?
23 If you could please read under the Detailed
24 Explanation of the Invention, those two paragraphs at
25 the bottom of the page.

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1 A (Complying.)

2 Yes.

3 Q And you've read those passages now --

4 A Yes.

5 Q -- on page 1583?

6 A Yes.

7 Q And I'd like you to now turn to page 1586.

8 A (Complying.)

9 Q And do you see here there are two
10 embodiments that show a 3x3 by three cube?

11 A Yes.

12 Q And then from your reading of the Detailed
13 Explanation of the Invention, this is an invention
14 whose object is turning the smaller cubies of the
15 larger cube?

16 A Yes.

17 Q And its object is to, when you're turning
18 those cubies, to match the external indicia which, in
19 this patent, describes pictures, letters, or patterns?

20 A (Reviewing.)

21 Yes.

22 MR. HUDIS: Off the record.

23 (A recess was taken at 12:28 p.m.)

24 (Exhibit 169 through Exhibit 176 were marked
25 for identification and are attached to the

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1 of the marked cube --

2 MR. HUDIS: And I owe it back to him.

3 MR. SAUNDERS: -- when it arrives.

4 MR. HUDIS: Glad you said that.

5 BY MR. HUDIS:

6 Q And now we also have the product that is
7 being accused of infringement in this litigation,
8 which is the Duncan Quick Cube™, in its packaging.

9 Do you see that, sir?

10 A Yes.

11 Q And just so we know that it's what it is,
12 what it purports to be, it was produced as Flambeau
13 production 1444.

14 Do you see that?

15 A Yes.

16 Q And it has the exhibit sticker on the
17 packaging, Exhibit 34?

18 A Yes.

19 (Exhibit 34 was previously marked for
20 identification and is attached to the transcript.)

21 Q And it has the Duncan name and the
22 Quick Cube™ product name on the packaging, right?

23 A Yes.

24 Q And inside is the Quick Cube™ bearing the
25 Duncan mark; do you see that?

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1 A Yes.

2 Q And in Exhibit 20 you have the Rubik's name
3 on it; do you see that?

4 A Yes.

5 Q And the packaging, the Rubik's name is also
6 on the cube, right?

7 A Yes.

8 Q Mr. Simms, before today, what knowledge did
9 you have of the Duncan Quick Cube™?

10 A Before today, I only had the knowledge which
11 was conveyed to me in the pleadings, which I believe
12 in an exhibit, had a picture of your client's product.

13 Q All right. And that's Deposition Exhibit
14 34?

15 A Yes, I believe that's the first time I saw
16 that object.

17 Q So I'll ask you the same series of questions
18 I asked you about the Rubik's Cube.

19 Have you ever bought a Duncan Quick Cube™
20 for yourself?

21 A No.

22 Q Did you ever buy a Duncan Quick Cube™ as a
23 gift for someone else?

24 A No.

25 Q Have you ever played with the Duncan

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1 beyond the scope of the expert report?

2 MR. HUDIS: I'll take that as your
3 continuing objection, not that we agree to it.

4 MR. SAUNDERS: I understand.

5 Q So Mr. Simms, on Exhibit 56, does Exhibit 56
6 direct the reader on how to solve the Rubik's Cube by
7 color?

8 A (Reviewing.)

9 Well, without reading every single item on
10 here, it appears to talk about colors as a way of
11 solving the puzzle.

12 Q And in fact, it's the six colors, red,
13 green, orange, blue, and yellow?

14 MR. SAUNDERS: Objection.

15 A Those are the colors, yes, and white.

16 Q Well, white is the absence of color; you'd
17 agree with that?

18 A Yes.

19 Q All right. So let's turn to Exhibit 169.
20 And is this another document that directs the reader
21 on how to solve the Rubik's Cube by color?

22 A (Reviewing.)

23 It appears to show various resolutions of
24 the puzzle by means of the colors that are on the toy.

25 Q And that's, just so we have it for the

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1 record, red, orange, blue, green, yellow, and white?

2 A Yes.

3 Q Let's go to Exhibit 58. Does this document
4 direct the reader on how to solve the Rubik's Cube by
5 color?

6 A (Reviewing.)

7 Yes, it appears to, without reading
8 everything on there.

9 Q Exhibit 174 taken from -- I'm out of order
10 so give me a second.

11 So now we'll go through the lesson plans,
12 okay, starting with Exhibit 57, and just so I can
13 speed it up, I'll just read a few passages from the
14 exhibit, production page 342.

15 "The questions on these slides are meant to
16 focus students on characteristics of the Rubik's Cube.
17 The term 'face' will be used throughout. You can do
18 Rubik's Cube material so you can" -- "so you will want
19 to make sure your students understand this term."

20 At page 344 it says, "The important
21 information on this page is that the center tile tells
22 you what the color face will be when the cube is
23 solved."

24 And on page 350 of Exhibit 57, it talks
25 about cube vocabulary, which is the three-dimensional

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1 And at 577 it says, "Congratulations, you
2 have solved the Rubik's Cube."

3 So these lesson plans of Exhibits 57, 170,
4 171, 172, and 173, serve to teach the students step by
5 step lesson by lesson on how to solve the Rubik's Cube
6 by color, correct?

7 MR. SAUNDERS: Object to the form of the
8 question. Compound.

9 A Without --

10 MR. SAUNDERS: Run on.

11 A -- viewing these in detail, I would assume
12 that what you stated is correct.

13 Q Uh-huh. Let's turn to Exhibit 174. It
14 says, "How to solve the 3x3 Rubik's Cube. We have
15 created a series of beginner solution guides with
16 handy tips and tricks to get the Rubik's Cube solved
17 in no time at all."

18 And these are video guides. They're
19 entitled "Get To Know Your Rubik's Cube: Solving the
20 White Cross"; "Solve the White Corner"; "Solving the
21 Middle Layer"; "Solve the Top Face, Solving the Final
22 Layer."

23 From what we see on these pages from the
24 rubiks.com website, are these video guides, directions
25 on how to solve the Rubik's Cube by color?

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1 MR. SAUNDERS: Objection on foundation, to
2 the extent the witness has never seen these before
3 today, and the continuing objection as beyond the
4 scope of the expert report and not reviewed in
5 connection with his opinions.

6 A I have no reason to doubt what you said.

7 Q If we could turn to Exhibit 175 on page 337,
8 it says, "The Rubik's Cube is the classic color
9 matching puzzle that is a great mental challenge at
10 home or on the move. Turn and twist the sides of the
11 cube so that each of the six faces has only one color.
12 A must for puzzle lovers, the aim is to twist and turn
13 the Rubik's Cube to return it to its original state,
14 with every side having one color."

15 So is this describing, on Exhibit 175, the
16 object of the Rubik's Cube is to solve it by color?

17 MR. SAUNDERS: Same objections.

18 A It appears to, yes.

19 Q Mr. Simms, could you now turn to Exhibit 59.
20 Exhibit 59, previously marked at an earlier
21 deposition, is a rendition of a 3x3 cube with 27
22 individual cubies, with all of the cubies on all sides
23 being black.

24 Do you see that?

25 A Yes.

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1 A Yes.

2 Q All right. So my question on Exhibit 60 is,
3 isn't the object of a cubing competition to solve the
4 cube by the six colors of the Rubik's Cube design in
5 the fastest time?

6 MR. SAUNDERS: Objection, lacks foundation.
7 And continuing objection to beyond the scope of the
8 expert report.

9 A It would appear that what you said is
10 correct.

11 Q Mr. Simms, do you know what a mosaic is?

12 A I think so.

13 Q What's your understanding of what a mosaic
14 is?

15 A A mosaic would be something which has a
16 variety of colors, perhaps, or other images.

17 Q So --

18 A But I would defer to the dictionary.

19 Q All right.

20 A Because it was not -- I was not asked to
21 opine on that, the meaning of mosaic, and I'm not
22 prepared for a definition.

23 Q All right. So I took out a definition of
24 mosaic from the internet --

25 A Okay.

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1 aware of the patent at that time, which was 1984,
2 correct?

3 MR. SAUNDERS: Object to the form of the
4 question.

5 A Who would have been aware?

6 Q Well, the Defendant in this case is CBS --

7 A Yes.

8 Q -- as the assignees of Ideal.

9 A Yes. And you asked me if Ideal would have
10 been aware --

11 Q Of the '201 patent, at least in 1984.

12 A If it was at one time a holder of that
13 patent, it should have been, yes.

14 Q Well, the holder of the patent was Nichols
15 and Moleculon, right?

16 A Okay.

17 Q So Ideal and CBS were the parties being
18 sued.

19 A Okay.

20 Q So my question was, by virtue of what's
21 stated in this decision, Ideal/CBS would have been
22 aware of the Nichols patent at least in 1984?

23 MR. SAUNDERS: Objection. That calls for
24 speculation and no foundation.

25 A In a suit against CBS, which is a successor

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1 to Ideal Toy.

2 Q Right. So CBS, a successor to Ideal Toy,
3 would have been aware of the Nichols patent at least
4 in 1984?

5 A Yes, CBS.

6 Q And if you could go to page 1424, which is
7 on printed page 8.

8 A (Complying.)

9 Q And it says that here, the discussion at the
10 bottom of the page, which says, "In February or March
11 of 1981, Obermayer/Moleculon first became aware of
12 Ideal's Rubik's Cube. Obermayer wrote to the
13 President of Ideal. Ideal responded that they studied
14 the prior art and believed that the Rubik's Cube did
15 not infringe the Nichols patent and in August of 1981,
16 Obermayer of Moleculon met with Ideal's Chairman to
17 discuss the possibility of a licensing deal."

18 Do you see that?

19 A Yes.

20 Q All right. So Ideal would have been aware
21 of the Nichols patent at least in 1981, correct?

22 MR. SAUNDERS: Objection. That calls for
23 speculation.

24 A Yes, I guess. It says they met with Ideal's
25 Chairman to discuss the possibility of Ideal licensing

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1 A I don't know if any other Court has so held,
2 no.

3 Q Let's turn back to your expert report,
4 Exhibit 158.

5 MR. HUDIS: Off the record.

6 (A discussion was held off the record.)

7 BY MR. HUDIS:

8 Q Mr. Simms you're familiar with your own
9 expert's report, correct? You are familiar with your
10 own expert report?

11 A Yes.

12 Q So we're going to be discussing -- the
13 report is marked as Exhibit 158.

14 In paragraphs 2, 20 through 26, and 34 of
15 your report you include -- you conclude that the
16 predecessor of Rubik's Brand did not commit fraud in
17 the prosecution of the Application underlying the '094
18 registration, correct?

19 A Yes.

20 Q And in paragraphs 2 and 23 of your report
21 you do concede that at no time did Rubik's
22 predecessors respond to the examining attorney's
23 request for patent numbers by listing patents,
24 correct?

25 A They did not specifically list patent

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1 numbers in a response, that's correct.

2 Q You also state in paragraphs 2, 26 and 34 of
3 your report that if the trademark owner had a good
4 faith belief that its mark was nonfunctional or
5 registrable, especially in view of decision so
6 holding, then the trademark owner could not commit
7 fraud, correct?

8 A Relying upon the court case, yes.

9 Q So, Mr. Simms, you have no personal
10 knowledge what the Applicant in this case, Ideal or
11 CBS, was thinking when it responded to the examining
12 attorney's request for patents, true?

13 A Of course.

14 Q So you actually don't know whether the
15 Applicant, Ideal or CBS, had a good faith belief that
16 the mark was nonfunctional and registrable, correct?

17 A We have no way of knowing what's in the mind
18 of Applicant or its officers.

19 Q So the Applicant could in fact have hidden
20 the knowledge of the patents from the examining
21 attorney, true?

22 A The Applicant did not hide the existence of
23 patents from the examining attorney; they were
24 discussed and quoted in a response and copies of
25 decisions referred to the Hungarian patent.